Antitrust Law: Case Development and Litigation Strategy

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SEMINAR PAPERS: PAPER TOPICS[1]

Welcome to the course. I hope that everyone is having a safe and restful break.

This course requires a paper rather than an exam. Since the semester goes by quickly and gets very busy with papers and exams at the end, I encourage you to start working on your papers early, starting with finding a topic and crafting the precise question your paper will address.

The introductory email explains in some detail the paper requirements for the course's two-credit and three-credit sessions (pp. 4-6). For now, three things are important:

1. While this is a procedure and case strategy course, you can write on any U.S. antitrust topic that interests you. I used to require that papers address a procedural question, but I allowed so many exceptions that I decided to drop the requirement. Paper topics are not exclusive—more than one student can write on the same topic.
2. We must agree on the precise question the paper will address. History suggests that this usually takes several rounds of discussions or emails. The introductory memorandum to the course explains more about this. The deadline for approval is Wednesday, January 29—about two weeks into the course.
3. Unless we agree otherwise, two-credit papers should be in the form of a reasoned memorandum of law, and three-credit papers should be in a form suitable for publication in a law journal.

Below are some popular questions to help you think about a paper topic. You are free to adopt one of these questions as a paper topic. Alternatively, we can work together on another topic of your choice.

Two-credit papers. Two-credit papers should provide a neutral, reasoned analysis in answering a question of law in a reasoned memorandum of law. These papers address what the law *is*, not what the law *ought* to be.

1. You have asked me to review the law in the various circuits as to whether and, if so, under what conditions a Rule 23(b)(3) class may be certified where the class definition encompasses some unidentified putative class members that were not injured by the challenged conduct. There is a split in the circuits on this question, and in the next few years, the Supreme Court will likely address the question.
2. You have asked me what needs to be alleged in a horizontal price-fixing complaint in addition to consciously parallel conduct to withstand a motion to dismiss under

[1] This memorandum was written in more haste than I like. If you see any errors in it, please let me know.

Rule 12(b)(6) on the element of conspiracy in a claim alleging a violation of Section 1 of the Sherman Act.

3. You have asked me to examine the FTC invitation-to-collude complaints and accompanying consent decrees to determine the circumstances under which the FTC is likely to challenge a firm for issuing an unaccepted invitation to collude in violation of Section 5 of the FTC Act.

4. You have asked me whether the standard for obtaining a preliminary injunction in federal district court against the consummation of an allegedly anticompetitive merger is lower for the Federal Trade Commission ("FTC") than it is for the Department of Justice ("DOJ"). You have also asked, if the FTC's standard is lower, what arguments can the merging parties make to the court to bring the standard in an FTC action closer to the standard in a DOJ action?

5. You have asked me to (1) identify the rule in Comcast Corp. v. Behrend, 569 U.S. 27 (2013), regarding class certification; (2) determine why the majority rejected the plaintiffs' evidence as insufficient to sustain class certification; (3) determine how and why the dissent differed from the majority; and (4) evaluate how *Comcast* has been applied in subsequent antitrust cases.

6. You have asked me whether a price-fixing plaintiff may withstand a motion to dismiss under Rule 12(b)(6) when the complaint seeks "umbrella damages" under Section 4 of the Clayton Act and alleges that (1) the plaintiff purchased its product from a nonconspiratorial competitor (2) at a supracompetitive price (3) enabled by the conspiracy.

7. You have asked me whether the jury findings in a breach of contract action are binding on the court on a purely equitable antitrust counterclaim when the defense in the contract action is that the allegedly breached covenants were anticompetitive restraints of trade that violated Section 1 of the Sherman Act and hence were void for public policy.[2]

8. You have asked me to explain the concept of pleading a factual allegation "on information and belief" in a complaint under Rule 8(a) of the Federal Rules of Civil Procedure, determine what degree of diligence an attorney must perform before pleading a factual allegation on information and belief to comply with Rule 11, and analyze under what conditions, if any, a court can credit factual allegations made on information and belief in deciding a *Twombly* motion to dismiss a complaint under Rule 12(b)(6).

9. You have asked me to explain the concept of offensive collateral estoppel under Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), and Parklane Hosiery Co., Inc. v.

[2] This question was suggested by claims and counterclaims in Epic Games, Inc. v. Google. *See* Complaint for Injunctive Relief, Epic Games, Inc. v. Google LLC, No. 3:21-md-02981-JD (N.D. Calif. filed Aug. 13, 2020); Defendants' Answers, Defenses, and Counterclaims to Epic Games, Inc.'s First Amended Complaint for Injunctive Relief (Oct. 11, 2021) (see here for major filings). You may find the following filings in the case helpful: Google's Statement on a Non-Jury Trial on Epic's Claims and Defenses (Nov. 1, 2023), and Brief of Epic Games, Inc. in Support of Maintaining the Jury Trial (Nov. 1, 2023).

Shore, 439 U.S. 322 (1979), and to examine when and how offensive collateral estoppel has been used in federal antitrust cases.[3]

Two-credit papers should address a question that can be answered in 15-18 double-spaced pages in 12-point Times Roman. Consider 15 pages a minimum requirement. There is no maximum page or word limit—keep the paper concise but take whatever space is necessary to do a complete job.

Three-credit papers. Three-credit papers require more depth than two-credit papers and must include a normative section critiquing the law or proposing new solutions. The law school requires that three-credit papers contain at least 6000 words (excluding footnotes). Historically, most three-credit papers submitted for this course range between 30 and 40 pages. As with two-credit papers, there is no maximum page or word limit—keep the paper concise but take whatever space is necessary to do a complete job.

While any two-credit topic above can be expanded into a three-credit paper by adding such analysis, here are some additional topics particularly suited for three-credit treatment:[4]

1. Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce."[5] Although early Sherman Act cases interpreted this language literally to prohibit *every* restraint of trade,[6] the Supreme Court in 1911 in *Standard Oil* held that the Sherman Act only prohibits *unreasonable* restraints of trade—an interpretation that has not since been questioned.[7] The *Standard Oil* Court also adopted two different standards of proof of unreasonableness, depending on the nature of the challenged conduct. In modern terms, the *per se rule* is a conclusive presumption of unreasonableness flowing from the nature and likely effects of the challenged conduct.[8] Per se illegal restraints are "plainly" or "manifestly" anticompetitive[9] and have a "pernicious effect on competition and lack . . . any redeeming virtue."[10] The other *Standard Oil* standard is the *rule of reason*, which is essentially the absence of a presumption of unreasonableness. The rule of reason is the default rule, and requires the plaintiff to prove the unreasonableness of the challenged restraint by affirmative proof. Although the Biden administration has been trying—

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[3] Offensive collateral estoppel, also known as issue preclusion, is a legal doctrine preventing a defendant from relitigating an issue that has already been decided against it in a previous case.

[4] To be clear, even if you chose one of these topics, we still will need to agree on the precise wording of the question for a three-credit paper. As we will discuss later, you will use this language in the opening sentence of the second paragraph of the paper's introduction to tell the reader the question the paper will address.

[5] 15 U.S.C. § 1.

[6] *See* United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897); United States v. Joint-Traffic Ass'n, 171 U.S. 505 (1898);

[7] Standard Oil Co. v. United States, 221 U.S. 1, 60 (1911).

[8] Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 342 (1990); Arizona v. Maricopa Cty. Med. Soc'y, 457 U.S. 332, 344 (1982).

[9] Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 723 (1988), Broadcast Music, Inc. v. CBS, 441 U.S. 1,8 (1979); National Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692 (1978); Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 50 (1977).

[10] Northern Pacific. Ry. Co. v. United States, 356 U.S. 1, 5 (1958); *accord* Northwest Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 289 (1985); State Oil Co. v. Khan, 522 U.S. 3, 10 (1997); Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 646 & n.9 (1980); United States v. Topco Assocs., 405 U.S. 596, 607 (1972); Fortner Enters. v. U.S. Steel Corp., 394 U.S. 495, 498 (1969); United States v. General Motors Corp., 384 U.S. 127, 146 (1966); White Motor Co. v. United States, 372 U.S. 253, 262 (1963).

unsuccessfully so far—to broaden the definition of unreasonableness, current law holds a restraint is unreasonable if it is on balance anticompetitive, that is, if it creates or facilitates the exercise of market power to the detriment of the customer.[11]

Beginning in the 1980s, a third standard, the *quick look*, emerged. This intermediate standard of proof, recognized by the Supreme Court in *California Dental* in 1999,[12] raises a rebuttable presumption of unreasonableness for restraints that appear inherently suspect but do not trigger the conclusive presumption of unreasonableness of the per se rule because of a lack of judicial experience with them.[13] The quick look applies where "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets."[14] Despite the endorsement of the Supreme Court, however, the quick look has gained little traction in the lower courts.[15] A paper could examine the historical evolution of the per se, rule of reason, and quick look methods of proof of an unreasonable restraint of trade, examine in detail the rules that emerge from *California Dental* and the application of these rules in subsequent cases, and conclude with a normative analysis of when and how, if at all, the quick look should be applied in modern antitrust law.[16]

2. Antitrust law has long recognized that restraints of trade can, in certain circumstances, promote competition rather than reduce it and hence not violate the antitrust laws.[17] The procompetitive effects of a restraint are called *efficiencies*. Efficiencies arise most often in merger antitrust cases. An acquisition, for example, may reduce the merged company's costs, incentivizing it to lower prices, or enable the merged company to innovate faster when it combines the patent portfolios and research capabilities of the merging firms. Often, a merger likely will simultaneously entail anticompetitive effects, say from a reduction in the number of competing firms, and procompetitive effects from efficiencies.

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[11] Ohio v. Am. Express Co., 138 S. Ct. 2274, 2284 (2018) ("[T]he plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market."); *see* Texaco Inc. v. Dagher, 547 U.S. 1, 5 (2006) (noting that under rule of reason analysis "antitrust plaintiffs must demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive before it will be found unlawful"); Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 886 (2007) ("In its design and function the rule [of reason] distinguishes between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest.").

[12] *See, e.g.*, California Dental Ass'n v. FTC, 526 U.S. 756 (1999); FTC v. Indiana Federation of Dentists, 476 U.S. 447 (1986); *NCAA*, 468 U.S. at 109-10; *see also* Texaco Inc. v. Dagher, 547 U.S. 1, 7 n.3 (2006) (recognizing "quick look" as a mode of analysis).

[13] *See* NCAA v. Board of Regents, 468 U.S. 85, 109 (1984); Deutscher Tennis Bund v. ATP Tour, Inc., 610 F.3d 820, 829-30 (3d Cir. 2010); Craftsmen Limousine, Inc. v. Ford Motor Co., 491 F.3d 380, 387 (8th Cir. 2007); United States v. Brown Univ., 5 F.3d 658, 669 (3d Cir. 1993).

[14] *California Dental*, 526 U.S. at 770.

[15] For modern cases rejecting the applicability of the quick look on the evidence presented, see, for example, NCAA v. Alston, 141 S. Ct. 2141, 2155 (2021); Winn-Dixie Stores, Inc. v. E. Mushroom Mktg. Coop., Inc., No. 22-2289, 2023 WL 8888532, at *4-*7 (3d Cir. Dec. 26, 2023); Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc., 9 F.4th 1102, 1113 n. 6 (9th Cir. 2021); 1-800 Contacts, Inc. v. Fed. Trade Comm'n, 1 F.4th 102, 117 (2d Cir. 2021); *In re* HIV Antitrust Litig., 656 F. Supp. 3d 963, 996 (N.D. Cal. 2023); Giordano v. Saks Inc., 654 F. Supp. 3d 174, 201 (E.D.N.Y. 2023); Ogden v. Little Caesar Enterprises, Inc., 393 F. Supp. 3d 622, 636 (E.D. Mich. 2019); Food Lion, LLC v. Dean Foods Co., No. 2:07-CV-188, 2016 WL 1259959, at *1 (E.D. Tenn. Mar. 30, 2016); Hannah's Boutique, Inc. v. Surdej, 112 F. Supp. 3d 758, 770 (N.D. Ill. 2015).

[16] In thinking about the quick look, you might look at Wayne D. Collins, *Rethinking the Quick Look: California Dental Association and the Future of Rule of Reason Analysis*, Antitrust, Fall 1999, at 54.

[17] For the seminal case, see Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918).

Merger antitrust law has developed a three-step burden-shifting approach to the analysis.[18] First, the plaintiff bears the burden of making a prima facie case that the merger has a gross anticompetitive tendency. Second, if the plaintiff satisfies this burden, the defendants bear the burden of production of showing that the procompetitive tendencies of the merger are likely to outweigh the anticompetitive tendencies. Finally, if the defendants satisfy this burden, the burden of persuasion on whether the net effect of the merger is anticompetitive or procompetitive falls on the plaintiff. Despite these well-established legal principles, the federal antitrust agencies have viewed efficiency defenses with great skepticism, if not outright hostility, and modern courts have yet to find a case where an efficiency defense has prevailed. A paper could describe the types of efficiencies that occur in mergers, review the treatment of efficiencies under the Merger Guidelines and by modern courts, and make a normative proposal of how efficiencies should be treated in modern antitrust law.

3. In 1914, Congress passed the Federal Trade Commission Act.[19] The act prohibits "unfair methods of competition"—which the statute did not define—and created a five-person Federal Trade Commission (FTC) empowered to investigate, challenge, and administratively adjudicate violations of the act. A paper could examine the history of the FTC's efforts to examine the scope of unfair methods of competition beyond conduct that violated the Sherman or Clayton Acts, explore how courts sought to constrain unfair methods of competition to conduct that violated the "letter or spirit" of the Sherman and Clayton Acts,[20] the resulting 2015 policy statement on Section 5,[21] the withdrawal of this statement as one of the FTC's first acts under Chair Lina Khan,[22] and the FTC's new

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[18] This approach was developed in United States v. Baker Hughes, Inc., 908 F.2d 981, 982-83 (D.C. Cir. 1990). All modern courts have adopted the Baker Hughes three-step burden-shifting approach in analyzing merger challenges under Section 7 of the Clayton Act. This is not too surprising since, apart from its analytical appeal, the opinion was written by Clarence Thomas and joined by Ruth Bader Ginsberg, both of whom became Supreme Court Justices.

[19] Ch. 311, 38 Stat. 717 (1914) (current version at 15 U.S.C. §§ 41-58).

[20] *See, e.g.*, Boise Cascade Corp. v. FTC, 637 F.2d 573 (9th Cir. 1980); Official Airline Guides, Inc. v. FTC, 630 F.2d 920 (2d Cir. 1980); E.I. du Pont de Nemours & Co. v. FTC, 729 F.2d 128 (2d Cir. 1984) (Ethyl); 1-800 Contacts, Inc. v. FTC, 1 F.4th 102 (2d Cir. 2021).

[21] Fed. Trade Comm'n, Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (Aug. 13, 2015); *see* Statement of the Federal Trade Commission on the Issuance of Enforcement Principles Regarding "Unfair Methods of Competition" under Section 5 of the FTC Act (August 13, 2015).

[22] Press Release, Fed. Trade Comm'n, FTC Rescinds 2015 Policy that Limited Its Enforcement Ability under the FTC Act (July 1, 2021); *see* Statement of Chair Lina M. Khan Joined by Commissioner Rohit Chopra and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (July 1, 2021); Dissenting Remarks of Commissioner Noah Joshua Phillips Regarding the Commission's Withdrawal of the Section 5 Policy Statement (July 1, 2021); Dissenting Statement of Commissioner Christine S. Wilson (July 1, 2021); Statement of the Commission on the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (July 9, 2021); Dissenting Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson on the "Statement of the Commission on the Withdrawal of the Statement of Enforcement Principles Regarding 'Unfair Methods of Competition' Under Section 5 of the FTC Act" (July 9, 2021).

Section 5 policy statement.[23] The paper could conclude with a normative proposal of the reach of Section 5's "unfair methods of competition" prohibition.

4. On January 5, 2023, the FTC, by a 3-1 vote, proposed a new rule to make noncompetition covenants outside the sale of a business an "unfair method of competition" under Section 5 of the FTC Act.[24] This blanket prohibition of noncompetition covenants rejects 400 years of jurisprudence holding that the legality of such covenants is to be determined by whether they were "reasonable" in scope, duration, and geographic coverage in the circumstances. The proposal raises questions of whether the FTC has any power under the FTC Act to promulgate substantive legislative rules defining methods of unfair competition and, if it does, whether the courts' cabining of "unfair methods of competition" excludes the FTC's power to promulgate this particular rule. The proposed rule also raises serious constitutional questions about whether the rule is outside the scope of the Commission's authority under the "major question" and nondelegation doctrines. The issues raised by the rule could not be more timely and are being actively litigated by opponents of the rule.[25]

5. In *FTC v. Meta Platforms, Inc.*, the FTC and, in a companion complaint, 48 states, are challenging, among other things, Facebook's acquisition of Instagram (acquired in 2012) and WhatsApp (acquired in 2014). Denying in part a motion to dismiss the complaint, the district court allowed the FTC's case to proceed, finding that the doctrine of laches does not apply to antitrust cases brought by a federal antitrust agency but dismissed the States' claims as time-barred.[26] The case raises a fundamental question in merger antitrust law: Under what conditions can a court find that an acquisition that closed years ago after being investigated preclosing by the federal antitrust agencies under the HSR Act but not challenged at the time be found now to violate Section 7 of the Clayton Act or Section 5 of the FTC Act. Three issues emerge: (1) Under what circumstances does the doctrine of laches govern whether a merger antitrust claim is time-barred? (2) When the doctrine of laches governs, what is the rule for deciding whether the claim is time-barred? (3) In particular, when the doctrine of laches does not time-bar a claim, what is the rule for determining whether the challenged acquisition violates Section 7 of the Clayton Act or, in an FTC case, Section 5 of the FTC Act?

6. In *Axon Enterprises, Inc. v. FTC*,[27] the Supreme Court rejected a long-standing judicial rule that constitutional structural challenges to the FTC's adjudicative process can be

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[23] Fed. Trade Comm'n, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (Nov. 10, 2022); *see* Press Release, Fed. Trade Comm'n, FTC Restores Rigorous Enforcement of Law Banning Unfair Methods of Competition (Nov. 10, 2022); Dissenting Statement of Commissioner Christine S. Wilson (Nov. 10, 2022).

[24] Press Release, Fed. Trade Comm'n, FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition (Jan. 5, 2023). The proposed rule can be found here.

[25] I have collected the proposed rule, the FTC fact sheet, and the supporting and dissenting statements of the commissioners here. If you are interested in exploring the FTC's proposed noncompete rule for a possible paper topic, be sure to read Commissioner Christine Wilson's dissenting statement. It tees up a number of the issues admirably.

[26] *See* FTC v. Facebook, Inc., 560 F. Supp. 3d 1 (D.D.C. June 28, 2021) (allowing Instagram and WhatsApp claims to proceed); New York v. Facebook, Inc., 549 F. Supp. 3d 6 (D.D.C. 2021) (dismissing states' complaint on laches), *aff'd sub nom*. New York v. Meta Platforms, Inc., 66 F.4th 288 (D.C. Cir. 2023).

[27] 598 U.S. 175 (Apr. 14, 2023).

heard in the first instance only in the administrative proceeding itself and held that district courts have federal question jurisdiction to hear these claims. In the wake of *Axon*, almost every FTC merger antitrust complaint—including complaints in federal district court under Section 13(b) of the FTC Act seeking a preliminary injunction pending a final resolution of the merits in an administrative adjudicative proceeding—has been met with affirmative defenses and sometimes counterclaims that the FTC's adjudicative process is structurally unconstitutional. These defenses and counterclaims variously allege, for example, (a) constraints on removal of the commissioners and the administrative law judge violate Article II of the Constitution and the separation of powers, (b) Congress unconstitutionally delegated legislative power to the Commission by failing to provide an intelligible principle by which the Commission would exercise the delegated power (presumably in violation of the nondelegation doctrine); (c) granting the relief sought would constitute a taking of the respondent's property in violation of the Fifth Amendment to the Constitution, (d) the adjudication of the complaint against the respondent through the related administrative proceedings violates the respondent's Seventh Amendment right to a jury trial, and (e) the adjudication of the complaint against the respondent's through the related administrative proceedings adjudicates private rights and therefore violates Article III of the U.S. Constitution and the Seventh Amendment.[28] A paper could survey the constitutional affirmative defenses and counterclaims against the FTC's adjudicative process, how the FTC has responded to these challenges, the likelihood of success of each claim under current law, and the prospects that the current Supreme Court, if and when it accepts a case raising constitutional challenges, would uphold with one or more of these challenges.[29]

7. Algorithmic pricing involves the use of computer algorithms and artificial intelligence to dynamically set prices in response to market demand and competitors' offerings. Under what conditions, if any, could using algorithmic pricing by a single firm or a group of competitors violate Sections 1 or 2 of the Sherman Act of Section 5 of the FTC Act? Key considerations might include the extent to which firms train their pricing algorithms on competitor data, how sophisticated algorithms could learn to engage in tacit collusion without human direction, and what kinds of information sharing about pricing algorithms might cross the line.

8. The FTC's *Amazon* case presents a more narrow question on algorithmic pricing: the use of pricing bots and price optimization programs. In September 2023, the FTC and

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[28] These particular claims are drawn from Defendant Intercontinental Exchange, Inc.'s Answer and Affirmative Defenses and Counterclaims, Defenses Fourth through Eight and Counterclaims ¶¶ 39-48, FTC v. Intercontinental Exchange, Inc., No. 3:23-cv-01710-AMO (N.D. Cal. filed Apr. 25, 2023). The case settled in August 2023, shortly before the preliminary hearing, so the constitutional issues will not be decided in this case. *See* Joint Stipulation For Dismissal Without Prejudice, FTC v. Intercontinental Exchange, Inc., No. 3:23-cv-01710-AMO (N.D. Cal. filed Aug. 7, 2023). An interesting question is to what extent did the constitutional challenges put pressure on the FTC to settle?

[29] The case will an excellent chance of reaching the Supreme Court was Illumina, Inc. v. FTC, 88 F.4th 1036 (5th Cir. Dec. 15, 2023), where the court of appeals summarily rejected each of the four constitutional arguments Illumina had made. Unfortunately, the parties decided to abandon their merger and will not be filing a petition for certiorari in the Supreme Court. *See* Press Release, Illumina, Inc., Illumina Announces Decision to Divest GRAIL (Dec. 17, 2023).

17 states sued Amazon in the District of Washington for violating the antitrust laws.[30] Among other things, the complaint alleges that Amazon used pricing bots and a price optimization program (codenamed "Project Nessie") to "covertly" raise prices for Amazon shoppers, extracting over a billion dollars from American households. Specifically, the complaint alleges Project Nessie analyzed historical pricing data to identify products where competitors were likely to follow Amazon's price increases, then algorithmically raised prices on those items, which in turn induced competitors to increase their prices. The complaint concludes that Project Nessie violated Section 5 of the FTC Act (Count IV). A paper could summarize the relevant allegations in the complaint together with any facts developed through an Internet search and evaluate under what conditions, if any, Amazon's conduct could have violated the Sherman Act or the Federal Trade Commission Act, and critique the district court's opinion sustaining the claim on a motion to dismiss.[31]

9. In the *Google Ad Tech* case,[32] the Justice Department and eight states alleged that Google is monopolizing multiple digital advertising technology products in violation of Sections 1 and 2 of the Sherman Act. The claims focus on Google's control over key digital advertising technologies (the "ad tech stack"), acquisitions aimed at eliminating competition, manipulating ad auctions, preventing data interoperability, and restricting access to user data. These actions allegedly stifled competition and innovation and harmed consumers and competitors in the digital advertising space. A paper could analyze these claims in detail, critically assess the legal arguments the Justice Department and Google are likely to make, and explore the potential outcomes and consequences of the case.[33]

10. A major focus of the Biden antitrust agencies is the creation and exercise of monopsony power.[34] Monopsony power exists when a single buyer (the monopsonist) has substantial control over an input market for a specific type of labor or product and can influence the input price and other terms of purchase to its advantage due to the lack of competition on the buying side of the market. This can result in the monopsonist paying lower prices

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[30] Complaint, FTC v. Amazon.com, Inc., No. 2:23-cv-01495-JHC (W.D. Wash. filed Sept. 26, 2023) (updated redacted version released Nov. 2, 2023).

[31] *See* Sealed Order On Defendant's Motion To Dismiss & Plaintiffs' Motion To Bifurcate, FTC v. Amazon.com, Inc., No. 2:23-cv-01495-JHC (W.D. Wash. Sept. 30, 2024) (public version).

[32] Complaint, United States v. Google LLC, No. 1:23-cv-00108 (E.D. Va. filed Jan. 24, 2023); *see* Press Release, U.S. Dep't of Justice, Justice Department Sues Google for Monopolizing Digital Advertising Technologies (Jan. 24, 2023). The Eastern District of Virginia is known as the "rocket docket" for the speed in which it adjudicates its cases. The complaint contains a damages claim based on the allegation that the federal government paid supracompetitive prices on its purchases in excess of $100 million of open web display advertising, Complaint ¶ 278. 341, Prayer ¶ 5, and the plaintiffs have requested a jury trial. Google has filed an answer. Defendant Google LLC's Answer to Plaintiffs' Complaint, No. 1:23-cv-00108 (E.D. Va. filed May 12, 2023). For a nice summary, see Alexander H. Pepper & Jay B. Sykes, Cong. Res. Serv., LSB10956, The DOJ's Ad Tech Antitrust Case Against Google: A Brief Overview (Apr. 27, 2023).

[33] The district court denied Google's motion to dismiss on April 28, 2023, *see* Order (Apr. 28, 2023); Transcript (Apr. 28, 2023) (motion to dismiss arguments and court's ruling from the bench), and its motion for summary judgment on June 14, 2024, *see* Order (June 14, 2024); Transcript (June 14, 2024) (summary judgment argument). For the docket materials with links for downloading, see Court Listener.com.

[34] A focus on monopsony power was an element in President Biden's Executive Order on Promoting Competition in the American Economy (July 9, 2021) and in the 2023 Merger Guidelines. *See* U.S. Dep't of Justice & Fed. Trade Comm'n, Merger Guidelines § 2.10 (rev. Dec. 18, 2023).

than would be the case in a competitive market, potentially leading to a reduction in overall market supply, inefficiencies, and welfare losses. Despite their oft-stated desire to bring antitrust cases—especially in labor markets in merger antitrust cases—on allegations of monopsony power, the Biden antitrust agencies have brought only one case and then in a very specialized labor input market.[35] A paper could examine the competitive effects of the exercise of monopsony power (perhaps limited to labor markets), the extent to which the antitrust laws could be used to prohibit or control the creation or use of monopsony power, some of the difficulties the agencies might face in finding and bringing such cases, and any proposals you have to changes in the statutes or judicial rules to improve competitive outcomes when monopsony power is present.

11. Vertical mergers occur within the chain of manufacture and distribution, such as the merger between an input manufacturer and a final goods producer or between a wholesaler and a retailer. The canonical anticompetitive effect is foreclosure. For example, a lithium battery manufacturer acquires a lithium mine that premerger supplied several battery manufacturers. After the acquisition, the combined company refuses to sell lithium to competitor-battery manufacturers. The idea is that in foreclosing its downstream competitors by refusing to sell them a critical input, the combined company will disadvantage its competitors—in the extreme, drive them out of business—and reap anticompetitive gains as the customers of the foreclosed competitors shift over to the combined firm. A more nuanced variation on foreclosure is raising rivals' costs, where the merged firm raises its prices to competitors rather than cuts them off altogether. Until recently, the antitrust enforcement agencies have litigated no vertical merger since 1980. The Supreme Court last heard a vertical merger case in 1972.[36] Until recently, the last adjudicated vertical case ended in 1979, when the Second Circuit denied enforcement to an FTC challenge.[37] When the agencies did challenge a vertical merger, they resolved the investigation through behavioral consent decrees requiring the merged firm to deal with rivals postmerger on fair, reasonable, and nondiscriminatory terms.[38] Things changed dramatically in the Trump administration when then-Assistant Attorney General Makan Delrahim took the position that the Division would no longer accept behavioral consent relief and challenged the AT&T/Time Warner transaction (where the DOJ lost

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[35] *See* United States v. Bertelsmann SE & Co. KGaA, No. CV 21-2886-FYP, 2022 WL 16949715 (D.D.C. Nov. 15, 2022) (enjoining the acquisition by Bertelsmann's Penguin Random House of Simon & Schuster from ViacomCBS because of likely anticompetitive effects in the market for the acquisition of U.S. publishing rights to anticipated "top-selling" books by well-known authors).

[36] Ford Motor Co. v. United States, 405 U.S. 562 (1972) (Ford/Autolite).

[37] Fruehauf Corp. v. FTC, 603 F.2d 345 (2d Cir. 1979), *denying enforcement*, Fruehauf Corp., 91 F.T.C. 132 (1978).

[38] *See, e.g.*, United States v. Comcast Corp., 808 F. Supp. 2d 145 (D.D.C. 2011) (Comcast/NBC Univeral); United States v. Google Inc., No. 1:11-cv-00688 (D.D.C. Oct. 5, 2011) (Google/ITA); United States v. United Techs. Corp., 946 F. Supp. 2d 135 (D.D.C. 2013) (UTC/Goodrich); United States v. Monsanto Co., No. 1:07-cv-00992, 2008 WL 5636384 (D.D.C. Nov. 6, 2008) (Monsanto/Delta & Pine Land); United States v. Charter Commc's, Inc., No. 1:16-cv-00759-RCL (D.D.C. Sept. 9, 2016); General Elec. Co., F.T.C. 255 (2013) (GE/Avio); *In re* Pepsico, Inc., 150 F.T.C. 231 (2010) (Pepsi/PBG); Coca-Cola Co., 150 F.T.C. 520 (2010) (Coca-Cola/CCE); Press Release, U.S. Dep't of Justice, Comcast Corporation Abandons Proposed Acquisition of Time Warner Cable after Justice Department and the Federal Communications Commission Informed Parties of Concerns (Apr. 24, 2015) (Comcast/Time Warner Cable); Press Release, U.S. Dep't of Justice, Lam Research Corp. and KLA-Tencor Corp. Abandon Merger Plans (Oct. 5, 2016) (Lam/KLA).

spectacularly).[39] Vertical mergers have been a major focus of the Biden antitrust agencies. They also reject behavioral consent decrees to resolve vertical concerns and have lost two of the three vertical mergers they have litigated.[40] A paper could explore the possible procompetitive and anticompetitive effects of vertical mergers, the history of DOJ/FTC antitrust enforcement—the 1960s when vertical mergers were all but per se unlawful, the middle period when the agencies favorably treated vertical mergers and concerns were settled with behavioral consent decrees, and the current period where the agencies are hostile to vertical mergers and will not accept consent decrees—the current state of vertical merger law, and any changes the Supreme Court is likely to make if and when it accepts a vertical merger case for review.

12. In *Illumina/GRAIL*,[41] the Fifth Circuit reviewed the FTC's decision ordering Illumina, a DNA-sequencing firm, to divest GRAIL, a cancer detection company. Reversing a dismissal of the complaint by the administrative law judge, the Commission found that the acquisition provided Illumina with the ability to harm Grail's multi-cancer early-detection (MCED) test competitors by foreclosing, raising the cost of, or otherwise impeding access to Illumina's next-generation gene sequencing (NGS) platform, a necessary input for running MCED tests. The Fifth Circuit largely affirmed the approach of the Commission to its vertical merger analysis, finding that the FTC had sufficiently made out its prima facie case that the merger was likely to substantially lessen competition under both the 1962 *Brown Shoe* test (whose continued vitality had been—and probably still is—very much in question) and the more modern "ability-and-incentive" foreclose test. The Fifth Circuit also agreed with the FTC that Illumina's efficiency claims were not cognizable as a defense. However, the court of appeals partially rejected the FTC's approach to "litigating the fix." The Fifth Circuit agreed, contrary to the approach urged by two other courts, that the Commission could make out its prima facie case on the likely competitive effects of the original transaction without considering the fix.[42] But the FTC also required Illumina to prove that its "fix" (an "Open Offer" to GRAIL's future competitors to supply them with its NGS platform at the same price and with the same access as Illumina provided to Grail) *completely* cured all of the competitive concerns proven in the FTC's prima facie case. The Fifth Circuit rejected this "total-negation standard," held that Illumina only had to show that the acquisition with the Open Letter in place sufficiently mitigated competitive concerns so that the "fixed" transaction was no longer likely to substantially lessen competition, vacated the

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[39] *See* United States v. AT&T Inc., 310 F. Supp. 3d 161 (D.D.C. June 12, 2018), *aff'd*, 916 F.3d 1029 (D.C. Cir. 2019)

[40] The two cases the Biden agencies lost are United States v. UnitedHealthcare Group Inc., 630 F. Supp.3d 118 (D.D.C. Sept. 21, 2022) (UnitedHealthcare/Change), and FTC v. Microsoft Corp., No. 23-CV-02880-JSC, 2023 WL 4443412 (N.D. Cal. July 10, 2023) (Microsoft/Activision). The Fifth Circuit agreed that the FTC had made out a prima facie case of liability in Illumina, Inc. v. FTC, 88 F.4th 1036 (5th Cir. Dec. 15, 2023) (Illumina/GRAIL), although it reversed an remanded because the FTC applied an uncorrect standard for assessing the parties' efforts to resolve the prima facie competitive concerns. See the next topic.

[41] *Id*., *vacating and remanding* Illumina, No. 9401 (F.T.C. Mar. 31, 2023). For the primary filings in the case, see here.

[42] Illumina had argued that the Commission must show that the "fixed" transaction was reasonably likely to substantially lessen competition in violation of Section 7 to prove its prima facie case. Illumina's approach was supported by Judge Nichols in United States v. UnitedHealthcare Group Inc., No. 1:22-CV-0481 (CJN), 2022 WL 4365867 (D.D.C. Sept. 21, 2022) (UnitedHealth/Change), and by Judge Reyes in a pretrial conference in United States v. Assa Abloy AAB, No. 1:22-cv-02791 (D.D.C. filed Sept. 15, 2022) (Assa Abloy/Spectrum Brands).

Commission's decision, and remanded for the Commission to reconsider the adequacy of the Open Letter under the proper standard. A paper could examine the business environment in which the Illumina/GRAIL acquisition took place, review the procedural history of the case before the administrative law judge and the full Commission, and critically evaluate Fifth Circuit's tests for proving a prima facie vertical merger case, its treatment of efficiencies, and its approach to how the standards and burdens of proof shift in evaluating a "fix" in a Section 7 case.[43]

13. The Robinson-Patman Act (RPA) was passed in 1936 to strengthen prohibitions on price discrimination included in the Clayton Act. The RPA was intended to protect small dealers from the buying power advantages of large chain stores with which the small firms competed. The act bans sellers from charging different buyers different prices for goods of like grade and quality if the price difference harms competition between favored and disfavored purchasers.[44] Early court interpretations took an aggressive view and effectively eliminated any defense against a prima facie RPA violation. However, the RPA came under heavy criticism from opponents who argued that, depending on the circumstances, price discrimination could be procompetitive rather than anticompetitive.[45] By the late 1970s, the federal enforcement agencies had largely ceased bringing Robinson-Patman Act cases, and in 1977, the Justice Department issued a lengthy report calling for the repeal of the RPA.[46] The FTC also effectively had withdrawn from RPA enforcement, limiting its investigations and prosecutions to industry-wide price discrimination with clear anticompetitive effect. Biden antitrust officials, however, are interested in reviving RPA enforcement and have been investigating possible RPA violations for the first time in decades. On December 12, 2024, these efforts culminated in the FTC's suit against Southern Glazer's Wine and Spirits, alleging that the company engaged in unlawful price discrimination in violation of the Robinson-Patman Act by offering discounts and rebates to large buyers that it did not make available to smaller buyers.[47] A paper could examine the origins and purposes of the RPA, briefly survey the seminal early cases, examine the possible anticompetitive and procompetitive effects of price discrimination, review the decline in agency enforcement, and explore the Biden administration's efforts to revive RPA

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[43] Illumina/GRAIL was the subject of multiple proceedings in the European Union, including a European Commission order that Illumina divest GRAIL. *See* Press Release, Eur. Comm'n, *Commission Orders Illumina To Unwind its Completed Acquisition of GRAIL* (Oct. 12, 2023).

[44] This type of price discrimination is called *secondary line price discrimination* in antitrust law and *third degree price discrimination* in economics. The RPA also prohibits primary line price discrimination (predatory pricing), certain discrimination in promotional allowances and fees, and certain types of commercial bribery. This paper topic only concerns secondary line price discrimination.

[45] For a treatment of the economics of price discrimination, see, for example, Dennis Carlton & Mark Israel, *Should Competition Policy Prohibit Price Discrimination?*, *in* The Handbook of Competition Economics (2009).

[46] U.S. Dep't of Justice, Report on the Robinson-Patman Act (1977). For a good history of RPA enforcement through the early 1980s, *see* Hugh C. Hansen, *Robinson-Patman Law: A Review and Analysis*, 51 Fordham L. Rev. 1133 (1984); *see also* Timothy J. Muris & Jonathan E. Nuechterlein, *Antitrust in the Internet Era: The Legacy of United States v. A&P*, 54 Rev. Indus. Org. 651 (2019) (examining A&P's conduct as a factor in the passage of the Robinson Patman Act).

[47] *See* Complaint, FTC v. Southern Glazer's Wine & Spirts, LLC, No. 8:24-cv-02684 (C.D. Calif. filed Dec. 12, 2024); Press Release, Fed. Trade Comm'n, FTC Sues Southern Glazer's for Illegal Price Discrimination (Dec. 12, 2024).

enforcement.[48] The paper could conclude with a normative proposal of how antitrust law should treat price discrimination today.

14. Pharmacy benefit managers (PBMs) act on behalf of health insurance companies to manage pharmacy benefits for insureds. To do this, they (a) contract with drug companies to sell their designated drugs to designated pharmacies at specified prices, (b) contract with pharmacies to join the PBM's limited "network," entitling the in-network pharmacy to receive these discounted prices, and (c) create "formularies" of drugs that specify which drugs will be "in-network" for insureds. The upshot is that insureds receive favorable prices (little on no copays) when they purchase drugs on the formulary from in-network pharmacies and pay much higher prices when they purchase drugs off the formulary or from out-of-network pharmacies, which "steers" insureds to formulary drugs purchased from in-network pharmacies. Drug companies then compete to have their drugs on the PBM's formulary by giving rebates to the PMB to include their drugs in the formulary and on the volume of drugs sold through the PBM's in-network pharmacies to the PBM's insureds. Pharmacies compete to be in the PBM's pharmacy network by charging the PBM lower prices for drugs on the formulary purchased by an insured. PBMs earn profits primarily through administrative fees they charge insurance companies for their services, through "spread pricing" (the difference between what the PBM pays to pharmacies and the negotiated payment the PBM receives from the health plans for the drug), and the part of the rebates or discounts negotiated with drug manufacturers that the PBM keeps.[49] A paper could review how PBMs function in the healthcare space, identify the potential antitrust violations that could arise from PBM practices and some of the various legislative proposals to regulate PBMs, and offer a normative analysis of how, if at all, antitrust law should treat the PBMs.[50]

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[48] For example, the FTC issued a policy statement warning drug companies and pharmacy benefits managers that their rebates and other pricing schemes could violate the RPA. *See* Fed. Trade Comm'n, Policy Statement of the Federal Trade Commission on Rebates and Fees in Exchange for Excluding Lower-Cost Drug Products (June 16, 2022). The FTC is also conducting an RPA investigation into whether Southern Glazer's, a distributor of wine and spirits products, has engaged in discriminatory practices in its sales to retailers like Total Wine, as reported in an FTC petition to enforce a civil investigative demand (CID—essentially a precomplaint subpoena) to Total Wine. *See* Petition of the Federal Trade Commission for a Show Cause Hearing and an Order Enforcing Civil Investigative Demand, FTC v. Retail Services & Systems, Inc., No. 1:23-mc-00028 (E.D. Va. Filed Oct. 20, 2023). For other reports on the FTC's interest in enforcing the RPA, see Mary G. Kaiser & Aaron Heath Scheinman, Morrison & Foerster, *FTC Will Move Forward with Robinson-Patman Act Enforcement "in Short Order"* (Mar. 28, 2023); Alden Abbott & Satya Marar, *The Robinson-Patman Act: A Statute at Odds with Competition and Economic Welfare* (Mercatus Center, George Mason University June 6, 2023) (same).

[49] My understanding of how PBMs operate may be somewhat off the mark in some details. For better and more detailed descriptions, see, for example, Center for Insurance Policy and Research, National Association of Insurance Commissioners, *Pharmacy Benefit Managers* (June 1, 2023); The Commonwealth Fund, *Pharmacy Benefit Managers and Their Role in Drug Spending* (Apr. 22, 2019); Elizabeth Seeley & Aaron S. Kesselheim, *The Commonwealth Fund, Pharmacy Benefit Managers: Practices, Controversies, and What Lies Ahead* (Mar. 2019).

[50] For further development of this topic, see, for example, Fed. Trade Comm'n, Policy Statement of the Federal Trade Commission on Rebates and Fees in Exchange for Excluding Lower-Cost Drug Products (June 16, 2022); Press Release, Fed. Trade Comm'n, *FTC Deepens Inquiry into Prescription Drug Middlemen* (May 17, 2023); Press Release, Fed. Trade Comm'n, *FTC Launches Inquiry Into Prescription Drug Middlemen Industry* (June 7, 2022); Hausfeld, *Will the FTC Resuscitate the Robinson Patman Act in an Effort To Bring Down Prescription Drug Prices?* (Aug. 24, 2022); José R. Guardado, American Medical Association, *Competition in Commercial PBM Markets and Vertical Integration of Health Insurers with PBMs: 2023 Update* (2023); Rose McNulty, American Journal of Managed Care, *PBMs: When Competition Does Not Benefit Consumers* (Nov. 8,

15. On January 16, 2023, in JetBlue/Spirit,[51] Judge William G. Young of the United States District Court District of Massachusetts ruled for the United States, six states, and the District of Columbia, finding that JetBlue's $3.8 billion pending acquisition of Spirit Airlines violated Section 7 and entered a permanent injunction blocking the transaction. JetBlue and Spirit are two of the fastest growing airlines in the nation. JetBlue is the sixth largest airline by revenue in the United States, with a U.S. revenue share of approximately 5%. Spirit is the seventh largest airline in the United States, with a revenue share of about 4%. The combination would produce the fifth largest U.S. airlines, with a U.S. revenue share of about 10%. Although these shares are usually too small to raise antitrust concerns, both JetBlue and Spirit have unique characteristics in the domestic airline space. JetBlue is a "low cost carrier" (LCC), with a lower cost structure than the legacy airlines. JetBlue prides itself as a "maverick" and "unique disruptor" in the airline industry, often taking an aggressive pricing approach to competing with legacy and other low-cost carriers. As a result, when JetBlue enters a market, fares tend to decrease, and when JetBlue exits a market, fares tend to increase, a phenomenon known in the industry as the JetBlue Effect." Spirit is an "ultra low cost carrier" (ULCC) with an even lower cost structure than JetBlue and offers even lower fares than JetBlue. JetBlue planned to eliminate Spirit as a brand and reconfigure its planes with JetBlue seat configurations, service amenities, and trade dress to enable JetBlue to better compete with the legacy carriers. Although Judge Young acknowledged that the acquisition would permit JetBlue to compete with the legacy carriers, he found that the acquisition would eliminate one of the airline industry's few primary competitors that provides unique innovation and price discipline, further consolidate an oligopoly by immediately doubling JetBlue's stakeholder size in the industry, likely incentivize JetBlue further to abandon its roots as a maverick, low-cost carrier, eliminate head-to-dead competition between JetBlue and Spirit on origin-and-destination routes on which they both compete, eliminate Spirit's unique mode of competition with other airlines, and eliminate Spirit as a choice for particularly budget-minded consumers. Judge Young also rejected the merging parties' ease of entry, failing company, and efficiency defenses. A paper could set the merger in the context of the modern airline industry, critically evaluate the court's assessment of the plaintiffs' theories of anticompetitive harm and the defendants' defenses and ultimate conclusion, and conclude with a normative proposal of how antitrust should treat airlines mergers in the future.

16. On August 13, 2020, Epic Games filed separate injunctive relief antitrust actions in the Northern District of California against Apple and Google alleging that each company violated the Sherman Act by monopolizing the app distribution and in-app payment processing markets on their respective operating systems.[52] At the heart of the antitrust

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2023); Hassan Tyler, *PBM Opponents Are Worried about their Own Bottom Lines* (July 20, 2023). The House Committee on Oversight and Accountability also has held several hearings on PBMs.

[51] Opinion, United States v. JetBlue Airways Corp., No. 1:23-cv-10511 (D. Mass Jan. 16, 2024). For the major filings in the case, see here.

[52] *See* Complaint for Injunctive Relief, Epic Games, Inc. v. Apple, Inc., No. 3:20-cv-05640 (N.D. Calif. filed Aug. 13, 2020) (see here for major filings); Complaint for Injunctive Relief, Epic Games, Inc. v. Google LLC, No. 3:21-md-02981-JD (N.D.Calif. filed Aug. 13, 2020) (see here for major filings). On February 5, 2021, the Judicial Panel on Multidistrict Litigation consolidated multiple related litigations against Google into a multiple district litigation named *In re* Google Play Store Antitrust Litigation and assigned the case to Judge James Donato of the Nothern District of California. *See* Transfer Order, *In re* Google Antitrust Litig., MDL No. 2981 (J.P.M.L.

claims were the 30 percent commission each platform charged on in-app purchases and their requirement for apps to use their in-built payment systems. In both actions, the platforms counterclaimed for damages for breach of the challenged restrictions. The two actions were not consolidated. Apple did not request a jury trial on its contract claims, and the *Apple* action was adjudicated in a bench trial. On September 10, 2021, Judge Yvonne Gonzalez Rogers dismissed the federal antitrust claims against Apple, which the Ninth Circuit affirmed.[53] Judge Rogers rejected the market definitions urged by each party, found the relevant market was "digital mobile gaming transactions," and held that Apple lacked monopoly power in this market. Judge Rogers also found that Epic had breached its contractual obligations to Apple and was liable for damages.[54] In the *Google* action, Google requested a jury trial on its breach of contract claims. Over two years later, on December 11, 2023, in a trial conducted by Judge James Donato, the jury found Google monopolized the Android app distribution market and the market for Android in-app billing services for digital goods and services.[55] Consequently, the jury only decided liability on the antitrust claims, and Judge Donato will decide the scope of the injunction to be entered in a separate proceeding to be scheduled later.[56] A paper could examine the similarities and differences in the operation of the Apple and Google app stores and in-app payment processing services, review the antitrust claims brought by the plaintiffs, critically analyze Judge Rogers' opinion, the Google Play Store jury's verdict and the decision by Judge Donato on Google anticipated motion for judgment as a matter of law,[57] and conclude with an analysis of whether the two cases should have different antitrust outcomes.

17. The *Epic/Google* case has moved to the relief phase. A paper could explore the competing proposals for relief in the case and propose that Judge Donato should grant.[58]

18. The doctrine of fraudulent concealment tolls the running of the statute of limitations where (1) the defendants acted affirmatively to conceal their violation of the law, (2) the plaintiff lacked actual or constructive knowledge of its claim against the defendants, and (3) the plaintiff exercised due diligence given the state of its knowledge in investigating its possible cause of action up until the time the plaintiff actually discovered the operative

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Feb. 5, 2021). The *Google Play Store* actions consist of six putative class actions on behalf of consumers; two putative class actions on behalf of app developers; and an individual app developer action. *Id*.

[53] Epic Games, Inc. v. Apple Inc., 559 F. Supp. 3d 898 (N.D. Cal. 2021), *aff'd in part, rev'd in part and remanded*, 67 F.4th 946 (9th Cir. 2023), *cert. denied*, No. 23-344, 2024 WL 156474 (U.S. Jan. 16, 2023).

[54] In fact, Epic stipulated that it had breached its agreement with Apple and as to the damages for such breach. *Epic Games (Apple)*, 559 F. Supp. 3d at 1064, 1068.

[55] Verdict Form, *In re* Google Play Store Antitrust Litig., No. 3:20-cv-05671-JD (N.D. Calif. Dec. 11, 2023). Liability on the contract claims was not before the jury because Epic stipulated it had breached its contract with Google. *See* Final Jury Instructions for Epic Trial (Dec. 6, 2023) ("For Google's request for a judgment on its breach of contract counterclaim, Dkt. No. 833 at 2 n.2, the Court will decide Epic's illegality defense after the jury returns its verdict, and will treat the parties' stipulated facts, *id*. at 1-2, as proved."); Joint Set of Proposed Jury Instructions 1-2 & nn.1-2 (Dec. 4, 2023) (containing stipulations). If the jury had rejected Epic's antitrust claims, damages would have been tried to a jury in a separate proceeding. If the jury's verdict on Epic's antitrust claims was upheld, then the breached restrictive covenants should be void for public policy and the contract counterclaim dismissed.

[56] *See* Bonnie Eslinger, *Google Judge Promises 'Hot Tub' After Epic's Antitrust Win*, Competition Law360, Jan. 18, 2024.

[57] *See* Order re Google's Renewed Motion for Judgment as Matter of Law or for New Trial in Epic Case (July 3, 2024) (reported at 2024 WL 3302068).

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facts underlying its claim. A paper could critically examine in depth the doctrine of fraudulent concealment, including the following questions:

a. What constitutes an "affirmative act of concealment"? Must the act of concealment be separate and apart from the acts that constitute the violation itself, or are some antitrust violations "self-concealing" and require no separate act?
b. What constitutes "actual or constructive knowledge" of a claim
c. What constitutes "inquiry notice," that is, what are the characteristics of the set of facts that put a plaintiff on notice that it may have an antitrust claim and so trigger a duty to exercise due diligence or lose the benefit of the further tolling of the statute of limitations?
d. Once on inquiry notice, how much diligence is "due," that is, what efforts must the potential plaintiff make to investigate whether it has a claim against the defendant to satisfy the requirement that it has exercised due diligence?
e. Does the doctrine of fraudulent concealment continue to toll the running of the statute of limitations if the plaintiff, on inquiry notice, conducts its due diligence but concludes that it has insufficient information to file a complaint consistent with the requirements of Rule 11 of the Federal Rules of Civil Procedure?
f. In a multiperson conspiracy, does the doctrine of fraudulent concealment operate separately on each potential defendant?

19. In the *Apple eBooks* case,[59] the district court, in a bench trial, found that Apple and five ebook publishers had engaged in a price-fixing conspiracy by jointly agreeing to adopt an "agency" model for the pricing of ebooks. As part of the relief, the district court ordered Apple to revise and tighten its antitrust compliance program and appointed a "monitor" to watch over Apple's compliance with this part of the order. In a filing on November 27, 2013, Apple objected to the monitor's activities, alleging that the monitor was "already operating in an unfettered and inappropriate manner, outside the scope of the Final Judgment, admittedly based on secret communications with the Court, and trampling Apple's rights." What powers can a monitor have in monitoring compliance with a court order and did the Apple monitor go too far?

These are just suggestions. Feel free to come up with your own ideas. Just remember that we must agree on the question before you start writing. Also, when considering a question, it is essential to match the amount of work to the credits you are taking.

If you start thinking about a paper topic, I would be delighted to discuss it with you over email, the phone, or Zoom. Just let me know when is a convenient time for you. If we do not talk beforehand, I look forward to meeting you at our first class on Tuesday, January 14.

Dale Collins

P.S. At some point early in the course, be sure to familiarize yourself with the materials on writing seminar papers. You can find them on Canvas or AppliedAntitrust.com.

[59] United States v. Apple, Inc., No. 1:12-CV-2826, 2013 WL 4774755 (S.D.N.Y. Sept. 5, 2013), *aff'd*, 791 F.3d 290 (2d Cir. 2015).